Nos. 77-1665 and 78-156

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH CHARLES BONANNO, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

*v.*

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

*v.*

THOMAS J. WHELAN and THOMAS M. FLAHERTY

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS*

## BRIEF FOR THE UNITED STATES

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# INDEX

Argument—Continued



## CITATIONS

Cases:





Cases—Continued

Cases—Continued





Cases—Continued



Constitution, statutes, rules and regulations:

Constitution, statutes, rules and regulations—Continued



Miscellaneous:





Miscellaneous—Continued

Miscellaneous—Continued Page





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**BRIEF FOR THE UNITED STATES**

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## OPINIONS BELOW

The opinion of the court of appeals in No. 78-156 (78-156 Pet. App. 1a-21a) is reported at 573 F.2d 147. The opinion of the district court in *Addonizio* (78-156 Pet. App. 27a-32a) is not reported. The first opinion of the United States District Court for the District of New Jersey in *Whelan* (78-156 Pet. App. 33a-42a) is reported at 427 F. Supp. 379. The two additional opinions of that court (78-156 Pet. Supp. App. 5-13) are not reported. The opinion of the United States District Court for the Middle District of Pennsylvania in a related proceeding involving respondents Whelan and Flaherty (78-156 Pet. App. 43a-50a), in which no review was sought in this Court, is not reported.

The opinion of the court of appeals in No. 77-1665 (77-1665 Pet. App. 22-25) is not reported. The opinion of the district court in that case (77-1665 Pet. App. 11-21) is not reported.

## JURISDICTION

The judgments of the court of appeals in No. 78-156 (78-156 Pet. App. 22a-26a) were entered on February 27, 1978. On May 19, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including July 27, 1978, and the petition was filed on that date. The judgment of the court of appeals in No. 77-1665 was entered on March 3, 1978. A petition for rehearing was denied on April 21, 1978 (77-1665 Pet. App. 26-27). The petition for a writ of certiorari was filed on May 22, 1978. The petitions were granted and the cases consolidated on December 11, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).



## QUESTION PRESENTED

Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing judge's expectations."

## STATUTES AND RULES INVOLVED

1. 18 U.S.C. 4205(a) provides:

   Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

2. 18 U.S.C. 4205(b) provides:

   Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maxi-

mum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

3. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

4. Fed. R. Crim. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed



> in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

5. Fed. R. Crim. P. 45(b) provides in part:

> the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

## STATEMENT

### A. Addonizio

Following a jury trial in the United States District Court for the District of New Jersey, Hugh J. Addonizio was convicted of conspiring to interfere with interstate commerce by extortion, and on 63 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. The evidence demonstrated that Addonizio, while Mayor of Newark, New Jersey, had engaged in an extensive conspiracy to extort money from persons doing business with the City. District Judge Barlow sentenced him on September 22, 1970, to 10 years' imprisonment and a fine of $25,000. The court

of appeals affirmed. *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

Addonizio's sentence was imposed under what is now 18 U.S.C. 4205(a), and he became eligible for parole on July 3, 1975, after serving one-third of his sentence. On July 8, 1975, the Parole Commission, after a hearing, denied parole and determined that release within the applicable guideline range of 26-36 months was not warranted because of the gravity of the offense (A. 13-14).[1] It set another hearing for January 1977. On January 13, 1977, the Commission again denied release and scheduled a further hearing for December 1977 (A. 11-12). The Commission explained that Addonizio's crimes were so extensive and demonstrated such a breach of public trust that a decision to release him would depreciate the seriousness of his offenses and promote disrespect for the law (A. 11-12).

Addonizio filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking the court to resentence him to time served (A. 15). Judge Barlow stated that in sentencing Addonizio he had expected him to be confined "for a period of approximately three and one-half to four years" (78-156 Pet. App. 28a) and to be held longer only if he had a poor institutional record. Judge Barlow explained that he had not anticipated that the Commission would give significant emphasis to the gravity of Addonizio's offenses, and he concluded that because of this emphasis Addonizio "has not received the type of meaningful parole hearing contemplated by the Court" (*id.* at 30a). After determining that he had jurisdiction under 28 U.S.C. 2255 to reduce any sentence concerning which his expectations had been frustrated (*id.* at 31a-32a), Judge Barlow reduced Addonizio's sentence to time served as of April 27, 1977.[2]

[1] See pages 26-31, *infra*, for a description of the guideline system.



### B. Whelan and Flaherty

Following a jury trial in the United States District Court for the District of New Jersey, Thomas J. Whelan and Thomas M. Flaherty were convicted on two counts of conspiracy to commit extortion and 27 counts of extortion, in violation of 18 U.S.C. 1951 and 1952. Whelan was the Mayor, and Flaherty a city councilman, of Jersey City, New Jersey (78-156 Pet. App. 50a). The evidence showed that they and others extorted at least $1.2 million from persons doing business with the City and deposited those sums in numbered accounts in Florida. The money has never been recovered. See *id.* at 34a-36a, 49a-50a.

[2] The court of appeals stayed the order reducing Addonizio's sentence. This Court then vacated the order of the court of appeals. *Addonizio* v. *United States*, 431 U.S. 909 (1977).

By the time Addonizio was released he had served five years and two months of his 10-year sentence. His earned good time gave him a projected mandatory release date of March 18, 1978. The reduction of his sentence thus relieved him of slightly less than a year of additional incarceration and about four years of conditional liberty subject to parole supervision.

On August 10, 1971, District Judge Shaw sentenced Whelan and Flaherty to 15 years' imprisonment each. In light of a plea agreement on tax evasion charges, Whelan and Flaherty did not appeal their convictions.[3] They did, however, file motions for reduction of sentence pursuant to Fed. R. Crim. P. 35, and Judge Shaw denied those motions on May 16, 1972 (78-156 Pet. App. 40a-41a). The court of appeals affirmed on December 8, 1972 (*id.* at 41a). Respondents then filed an action under 28 U.S.C. 2255 contending that their sentences were arbitrary and excessive, but Judge Shaw denied relief on December 12, 1973, and the court of appeals again affirmed (78-156 Pet. App. 41a).

Whelan and Flaherty, like Addonizio, were sentenced under what is now 18 U.S.C. 4205(a). They thus became eligible for parole in 1976, after serving one-third of their sentences. The Parole Commission held a hearing in June 1976; on July 7, 1976, it denied their applications for parole and set June 1978 as the date for the next hearing (A. 60-61, 66-67). The Commission explained that the guideline ranges for respondents indicated that they should serve a total of 26 to 36 months' imprisonment, but that respondents would not be released because their offenses were part of large-scale organized criminal activity and involved a breach of the public trust (A. 60, 66).

[3] The tax evasion sentences, which were affirmed by the court of appeals, run concurrently with the extortion sentences. See *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972).



Whelan and Flaherty then filed two suits challenging their confinement. One, invoking jurisdiction under 28 U.S.C. 2255, was filed in the sentencing court. It was assigned to Judge Biunno, because Judge Shaw had died. The other, invoking jurisdiction under 28 U.S.C. 2241, was filed in the district of confinement (the Middle District of Pennsylvania) and assigned to Judge Muir.

Judge Biunno decided the Section 2255 case in March 1977 (78-156 Pet. App. 33a-42a). He concluded that most of the arguments were "a rehash of what was argued before Judge Shaw" (*id.* at 35a) and that the only new point was a contention that decisions of the Parole Commission had frustrated Judge Shaw's sentencing intent. Judge Biunno stated (*ibid.*): "[T]he real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." After examining the nature of Whelan and Flaherty's crimes, Judge Biunno concluded that the Commission properly denied parole because "[t]he spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains" would be "revolting" (*id.* at 36a). Judge Biunno also examined the statements Judge Shaw had made during earlier proceedings and determined that "a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing" (*id.* at 37a n.2). Judge Biunno therefore denied respondents' motion to reduce sentence.

Judge Muir decided the Section 2241 case in September 1977 (78-156 Pet. App. 43a-50a). He con-

cluded that a court sitting in habeas corpus may correct arbitrary and capricious decisions by the Commission (*id.* at 47a-48a). He held, however, that it was appropriate for the Commission to deny parole to Whelan and Flaherty in light of the nature of their crimes (*id.* at 49a-50a). He therefore denied the petitions for habeas corpus.

### C. Bonanno

Following a jury trial in the United States District Court for the Northern District of California, Bonanno was convicted on three counts of collecting debts by extortionate means, in violation of 18 U.S.C. 894, and on one count of conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced by District Judge Peckham to concurrent terms of five years' imprisonment, and the court of appeals affirmed. *United States* v. *Bonanno*, 467 F.2d 14 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973).

Bonanno's sentences were imposed under 18 U.S.C. (1970 ed.) 4208(a)(2), which is now 18 U.S.C. (1976 ed.) 4205(b)(2), making him eligible for parole at any time in the discretion of the Parole Commission. Bonanno began serving his sentence on August 17, 1973 (77-1665 Pet. App. 13). He had a parole hearing on October 3, 1974; on January 15, 1975, the Commission denied his application for parole and concluded that he should serve all of his sentence (A. 75-76). (The Commission called for a progress report after completion of one-third of the sentence, thus holding open the possibility that it



might change its mind.)[4] Although the Commission explained that, under its parole release guidelines, the ordinary period of confinement for someone with Bonanno's offense and offender characteristics would be between 26 and 36 months, the Commission decided to require Bonanno to serve all of his sentence because of the seriousness of his particular offenses (A. 75).

On May 22, 1975, Bonanno filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking that court to reduce his sentence (77-1665 Pet. App. 1-10). He argued that the court, by imposing sentence pursuant to 18 U.S.C. 4205(b)(2), had intended that he be paroled no later than the completion of one-third of his maximum term, given good institutional conduct. Judge Peckham granted this motion (77-1665 Pet. App. 11-21). He suspended Bonanno's sentences and placed him on five years' probation (*id.* at 24). Bonanno was released in October 1975.

Judge Peckham stated that, when he sentenced Bonanno, he had expected "institutional adjustment of the defendant * * * to be the most important consideration * * * in deciding whether or not to grant parole" (77-1665 Pet. App. 16). The judge found that it amounted to a "failure" (*ibid.*) for the Commission not to have considered Bonanno's institutional conduct. This, coupled with the Commission's "par-

[4] On May 19, 1975, following receipt of the interim progress report, the Commission informed Bonanno that there would be no change in its original decision not to grant him parole (A. 78-79).

tial" reliance on the guideline regulations adopted after the sentencing, led Judge Peckham to conclude that the Commission's decision "does not comport with the exceptions [*sic*] or intentions of this court at the time of sentencing" (*ibid.*). The judge also concluded that he had jurisdiction under 28 U.S.C. 2255 to revise a sentence if actions of the Commission should frustrate his sentencing intentions (77-1665 Pet. App. 17).

### D. The Decisions Of The Courts Of Appeals

#### 1. *Addonizio, Whelan and Flaherty*

*a.* The United States appealed from the reduction of Addonizio's sentence, and Whelan and Flaherty appealed from the denials of relief in both of their cases. The Third Circuit affirmed Judge Muir's decision, holding that Judge Muir had stated the proper standard and applied it correctly (78-156 Pet. App. 20a).[5] The court reversed Judge Biunno's decision denying relief to Whelan and Flaherty and affirmed the decision granting relief to Addonizio.

The court of appeals first held that district courts have jurisdiction to revise sentences under 28 U.S.C. 2255. It characterized Section 2255 and Fed. R. Crim. P. 35—which allows reduction of sentence within 120 days after the sentence becomes final—as simply alternate methods of sentence review (78-156 Pet.

[5] Whelan and Flaherty did not seek review of this judgment—nor, of course, did we—and it therefore has become final.



App. 4a-6a). Then, building on three earlier cases,[6] it held that a district court may revise a sentence, lawful when imposed, in response to parole decisions that frustrate its sentencing intent. The governing principle, the court stated, is that because judges have "near-absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the [maximum] extent possible" (*id.* at 9a). The court continued: "regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that the court should be in a position to vindicate [its] original intentions and expectations" (*ibid.*).

These "moral considerations" (78-156 Pet. App. 9a), the court explained, are especially applicable when there has been a "post-sentencing change in criteria governing parole determinations" (*ibid.*). The court thought that there had been such a change here, not so much because of the introduction in 1973 of a system of guidelines (for Addonizio, Whelan and Flaherty had been held in prison beyond the periods projected by the guidelines for ordinary cases), but because it believed that the Commission formerly did not consider the seriousness of the offense in deciding whether to grant parole. At the time Addonizio, Whelan and Flaherty were sentenced, the court stated,

[6] *United States* v. *Salerno*, 538 F.2d 1005 (3d Cir.), rehearing denied, 542 F.2d 628 (1976); *United States* v. *Somers*, 552 F.2d 108 (3d Cir. 1977); *United States* v. *Solly*, 559 F.2d 230 (3d Cir. 1977).

sentencing courts "operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the [Commission] would generally grant parole upon the completion of one-third of the sentence" (*id.* at 11a). Because that assumption does not accord with the Commission's practice, the court found that the Commission's release policy frustrates the expectations of judges who imposed sentences before the change.

The court of appeals found this enough to require affirmance of the decision in Addonizio's case, because the sentencing judge explicitly stated that his intent had been frustrated (78-156 Pet. App. 12a-18a). Moreover, the court concluded, the Commission was not entitled to deny parole for the same reason that the sentencing judge had considered in imposing sentence—the seriousness of the offense. It stated (*id.* at 16a): "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." As to Whelan and Flaherty, the court ruled that they "should have the benefit of the rule this court announces today" (*id.* at 19a) and that Judge Biunno must reconsider the case to determine whether Judge Shaw's intent had been frustrated.

*b.* Because the government did not seek a stay of the judgment of the court of appeals concerning Whelan and Flaherty, the district court began the remand proceedings required by the court of appeals. On July 21, 1978, before the district court issued an



order, the National Appeals Board of the Parole Commission decided to release Whelan and Flaherty on parole on August 10, 1978. The district court then filed an opinion stating that the case was moot because Whelan and Flaherty had received adequate relief (78-156 Pet. Supp. App. 5-10). The court's opinion also questioned the assumptions of the court of appeals concerning the amount of time prisoners sentenced during or prior to 1973 could expect to serve before release on parole (*id.* at 8-9). Judge Biunno computed the length of time that persons sentenced by Judge Shaw had served, and the computations established that many persons sentenced during or prior to 1970 had served a good deal more than one-third of their sentences.

Both the United States Attorney and counsel for Whelan and Flaherty then wrote to Judge Biunno, stating that the release of Whelan and Flaherty on parole did not moot the case. Judge Biunno wrote a supplemental opinion (78-156 Pet. Supp. App. 11-14), stating that although the case was not moot "in the usual sense" (*id.* at 11), there was no need to pass on the motions for reduction of sentence.

Before learning of Judge Biunno's second opinion, the Parole Commission voted to defer the release of Whelan and Flaherty pending completion of further investigation. Information in the possession of the Commission indicated that Whelan and Flaherty had not been entirely candid with the Commission concerning the status of the monies they had wrongfully obtained. The Commission set a hearing for October

1978 to consider pre-release rescission of the parole that had been granted to Whelan and Flaherty.

Whelan and Flaherty promptly requested the district court to reinstate and grant their motions for reduction of sentence. Judge Biunno vacated his earlier decisions concerning mootness and on August 23, 1978, reduced their sentences (78-156 Pet. Supp. App. 15-20). Judge Biunno did not write an opinion explaining this reduction, but he did give an oral statement of reasons.[7] The terms of the new sentences

[7] Judge Biunno reviewed the records concerning Judge Shaw's sentence and concluded that the 15-year sentences were substantial but not close to the maximum that court might have imposed. Although matters were "equivocal on the critical question of whether Whelan and Flaherty have established as a matter of fact a frustration of Judge Shaw's sentencing intent and expectation" (Aug. 23, 1978, Tr. 75), Judge Biunno concluded that Judge Shaw had considered the seriousness of the crimes in imposing sentence. Under these circumstances, Judge Biunno stated, the Third Circuit's position is that the Commission's consideration of the seriousness of the crimes "as a matter of law * * * frustrates the sentencing Judge's intention" (*id.* at 70). Judge Biunno also looked at the median time for the parole of persons sentenced by Judge Shaw; he found that Whelan and Flaherty had been held slightly longer than the median (*id.* at 76-77). Judge Biunno concluded (*id.* at 77): "in light of the ruling by the Court of Appeals that the seriousness of the offense of itself cannot be taken into account twice, the Court considers itself bound thereby and accordingly obliged to correct the sentence, regardless of its own views on the subject. However, it does not appear that a sentence to time served would be an appropriate remedy to be fashioned. This is because Judge Shaw would have naturally expected that when released on parole defendants would remain subject to parole supervision for the remainder of the 15-year terms."



required the immediate release of Whelan and Flaherty on accumulated good time credits. On September 5, 1978, Whelan and Flaherty filed notices of appeal from the terms of their August 1978 reduction of sentence and release. On October 3, 1978, the United States filed a cross-appeal. Those appeals are pending before the Third Circuit. As required by Judge Biunno's order, however, Whelan and Flaherty have been released.[8]

### 2. *Bonanno*

*a.* The Ninth Circuit reversed the order of the district court suspending Bonanno's sentence (77-1665 Pet. App. 22-25). Relying on *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977), the court held that the district courts do not have jurisdiction to reduce sentences in response to parole decisions, and that the only remedy for arbitrary or capricious action by the Commission is a petition for a writ of habeas corpus in the district of the prisoner's confinement.

*b.* While the case was pending in the court of appeals, Bonanno remained free on the probation that had been substituted for his original sentence. In February 1978 the probation office accused Bonanno

[8] These subsequent proceedings do not affect this case. If, as we argue, the courts do not have authority to revise sentences in response to parole decisions or changes in parole policies, then this Court should reverse the judgment of the court of appeals. Following the reversal, the district courts would be required to annul the sentence revisions and to restore the original sentences. See *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

of four violations of the conditions of his probation. *United States* v. *Bonanno*, 452 F. Supp. 743, 746 (N.D. Cal. 1978). Probation revocation proceedings were commenced. The court of appeals' judgment reversing Judge Peckham's resentencing was entered on March 3, 1978, but the district court held a hearing on the probation revocation before it received the court of appeals' mandate, and it concluded that Bonanno had violated the terms of his release. *Ibid.* (Because the district court had not received the mandate, all parties proceeded on the assumption that the probation continued to be in force. See 452 F. Supp. at 745 n.2.) On June 22, 1978, Judge Peckham revoked Bonanno's probation and ordered him to serve the five year term that had been imposed and suspended in October 1975 as a substitute for the concurrent five year terms originally imposed in 1972.

Bonanno consequently is serving a sentence of five years' imprisonment, the same length of imprisonment he was serving when he sought relief from the district court. The time Bonanno served under the original sentence has been credited to the service of his sentence following revocation of probation. Unless he commits disciplinary infractions while in prison, Bonanno will be released on accumulated good time credits on December 23, 1979, the same day that he would be released under the judgment of the court of appeals.[9]

[9] Because Bonanno has appealed from the order revoking his probation, there is one way in which the Court's judgment in the present case might affect his rights. If this Court should reverse the judgment of the court of appeals, then the district court's order placing Bonanno on probation would stand. If the court of appeals then should reverse the district court's order revoking Bonanno's probation, he would be released from prison. On the other hand, if this Court should affirm the judgment of the court of appeals, then Bonanno will remain in prison until December 1979 whether or not he violated the terms of his probation; any possibility of earlier release would be entirely in the hands of the Parole Commission. This potential difference means that the case is not moot.



## SUMMARY OF ARGUMENT

### A

This case involves questions about the allocation of authority to determine how long a convicted prisoner remains in jail.

Courts have the authority to select maximum terms of imprisonment from the terms authorized by Congress. They also can select minimum terms, but the minimum term cannot exceed one-third of the maximum they select. During the period between the prisoner's first eligibility for parole and the mandatory release date set by the accumulation of good time credits, the Parole Commission has substantial discretion to decide whether to grant release.

Until 1972 the Commission exercised that discretion case by case, using few explicit standards. But when studies showed that the Commission's decisions were in fact generally a product of the severity of the offense and a few basic personal characteristics of the prisoner, the Commission adopted a set of guidelines that announced these criteria and took them into account in a more formal way. The guidelines ensure

greater uniformity but essentially codify the considerations that the Commission has used for some years.

B

Congress has allocated to judges the power to select outer limits on imprisonment and to the Commission the power to set a release date within these limits. This division of responsibilities reduces the demands of prisoners on judicial time, enables the Commission to smooth out the disparity in sentence length that is associated with sentencing by individual judges, and permits experienced penologists to assess each prisoner's release prognosis.

1. The foundation for the Third Circuit's holding that sentencing judges can revise sentences if the decisions of the Commission frustrate the expectations the judges had when imposing sentence is that, if judges can control the maximum term of confinement, they necessarily must be able to control the actual date of release. That is a non sequitur. It amounts to simple disagreement with the statutes that commit the release decision to an independent commission within the Executive Branch. Unless the decisions of the Commission sometimes differ from those that judges would have made, there would be little point in having a Commission. And unless the Commission can disappoint judges' expectations it cannot reduce the effects of the disparate sentencing practices of individual judges.

So long as Congress adheres to its decision that release determinations should be made by an inde-



pendent body, courts cannot insist that that body exercise its discretion in any particular way. An attempt by a judge to ensure release at a particular time in accord with his expectations at the time of sentencing thus usurps the authority Congress gave to the Commission and defeats the objectives of placing the release decision in a separate body.

2. The Third Circuit also reasoned that the Commission had imposed a "double punishment" because both the Commission and the sentencing judge took account of offense severity in determining how long the prisoners should serve. The court reasoned that, once a judge had given an especially substantial sentence because of the severity of the offense, the Commission could not deny release on the basis of the same considerations.

But these cases involve only one punishment—the sentence imposed by the district court. No matter what factors the Commission may consider, it cannot require a prisoner to serve more than the maximum selected by the Judicial Branch. Unless the Third Circuit meant to prohibit the Commission from thinking about anything that may have influenced the length of the sentence, this argument reduces to the observation that courts may not perfectly anticipate or be able to control the Commission's release decisions. And there is no basis for prohibiting the Commission from considering things that may have influenced the length of the sentence. Both the courts and the Commission may consider any relevant factor.

3. The Third Circuit also may have concluded that a parole hearing is not "meaningful" unless it gives dominant roles to rehabilitation and institutional conduct, and that judges may reduce their sentences in response to the lack of "meaningful" consideration of those factors. But the meaning of a parole hearing lies in the application of established rules to particular facts. A court cannot, under the rubric of ensuring a meaningful hearing, control the content of the rules that the Commission applies. The Commission possesses ample statutory authority to take factors other than rehabilitation into account when making release decisions.

C

Even if the Third Circuit were correct in concluding that sentencing judges may have legitimate expectations about the Parole Commission's decisions, it would not follow that courts are entitled to revise their sentences on collateral attack when parole decisions disappoint their expectations. This Court has repeatedly held that courts may not reduce a sentence once its service has begun. Fed. R. Crim. P. 35 modifies that rule, but only during the first 120 days after a sentence has become final.

Given the fundamental principle that courts do not have a continuing authority to revise sentences, the Third Circuit was wrong in concluding that 28 U.S.C. 2255 supplies a residual source of judicial authority to resentence defendants in response to parole decisions. Although Section 2255 permits courts to vacate



sentences that are "subject to collateral attack," that provision applies only when the trial or sentence is infected by a fundamental error that results in a complete miscarriage of justice. A sentencing judge's mistaken assumption about the way in which the Commission would exercise its discretion is not such a defect. The sentences here were lawful when imposed, and the Commission's decision that the defendants must serve their full sentences (less good time credits) does not expose them to collateral attack. Service of a lawful sentence simply is not a complete miscarriage of justice.

D

Much of the Third Circuit's rationale was influenced by its belief that the Commission radically changed its practices after the defendants were sentenced. That belief is incorrect.

The Commission has never had a presumption in favor of release after service of one-third of the maximum sentence imposed by the court. The Commission's public statements consistently emphasized the weight it gave to the seriousness of the offense and considerations of deterrence. The governing statutes always have permitted the Commission to consider offense severity. Indeed, scholars who studied the Commission's decisions during the years the defendants here were sentenced found that offense severity was one of the most important factors in explaining release decisions. During 1970 only 42.2% of prisoners with good institutional records were released at or soon after the one-third point. Any rule based on the

belief that until 1973 the Commission did not give substantial weight to the nature and circumstances of the offense thus cannot stand.

## ARGUMENT

### A DISTRICT COURT MAY NOT REVISE A SENTENCE ON COLLATERAL ATTACK SIMPLY BECAUSE THE PAROLE COMMISSION'S POLICIES, OR ITS DECISION IN A PARTICULAR CASE, "FRUSTRATE THE JUDGE'S SENTENCING EXPECTATIONS"

This case involves questions about the allocation of authority to determine how long a convicted prisoner remains in jail. We therefore first describe the sentencing options available to a sentencing judge, the statutory provisions governing release, and the recent changes in the Parole Commission's approach to its task. We then turn to the question whether these changes, or a decision in a particular case, entitle a sentencing judge to impose a new sentence in order to control more precisely the amount of time a prisoner serves before release.

#### A. The Sentencing And Parole Release Systems

A district judge has numerous options when sentencing a defendant who has been convicted of a crime. A number of these options depend on the mental condition, age, or drug addiction of the defendant,[10] but the three options most commonly used

[10] See, for example, 18 U.S.C. 4205(c) (commitment for psychological study), 18 U.S.C. 4216 (offenders 22 to 25 years old at the time of conviction), 18 U.S.C. 4251-4255 (narcotic addicts), 18 U.S.C. 5005-5026 (offender less than 22 years old at the time of conviction), 18 U.S.C. 5031-5042 (juvenile delinquents).



are specified by 18 U.S.C. 4205(a) and (b).[11] A sentence under Section 4205(a) requires the prisoner to serve one-third of the maximum sentence imposed before becoming eligible for parole.[12] A court may elect to impose sentence under Section 4205(b)(2), in which event the prisoner "may be released on parole at such time as the [Parole] Commission may determine." Or a court may designate, under Section 4205(b)(1), a minimum term of imprisonment that will establish parole eligibility somewhere between the beginning of the sentence and one-third of the maximum.

Courts may suspend any sentence they impose and place the defendant on probation for a period that does not exceed five years. 18 U.S.C. 3651. A court may not, however, split a lengthy sentence between imprisonment and probation in a way that dictates the amount of time the prisoner spends in prison.

[11] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219-231. Former Sections 4202, 4208(a)(1), and 4208(a)(2) are recodified at 18 U.S.C. 4205(a), 4205(b)(1) and 4205(b)(2), respectively. The Act also renamed the Board of Parole as the Parole Commission. For purposes of clarity, this brief uses both the numbering system and the terminology of the present statute, regardless of the numbering system and terminology in effect at the time particular events took place.

[12] If the sentence is more than 30 years, the prisoner is eligible for parole after serving 10 years.

Probation may not be combined with a sentence entailing incarceration of more than six months (Section 3651 ¶ 2).

A prisoner is entitled to be released at the expiration of his maximum sentence, less "good time" computed according to 18 U.S.C. 4161. Good time can be as much as one-third of the sentence, but more commonly it amounts to approximately one-quarter of the sentence. Such prisoners are released "as if on parole" and come under the supervision of the Commission on release. A prisoner also acquires an expectation of release slightly before the point established by accumulated good time. Under 18 U.S.C. 4206(d) any prisoner sentenced to more than five years' imprisonment "shall be released on parole after having served two-thirds of each consecutive term" or 30 years, whichever is first, unless the Commission determines that the prisoner "has seriously or frequently violated institutional rules" or that there is a "reasonable probability" that the prisoner would commit further crimes.

During the period between the prisoner's first eligibility for parole and the two-thirds point, the Commission has substantial discretion to decide whether to grant release on parole. 18 U.S.C. 4206(a).[13] Under 18 U.S.C. (1970 ed.) 4203, which was in effect when respondents were sentenced, the

[13] See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976); H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 25 (1976).



Commission was entitled to consider the risk of recidivism and any other aspect of the public welfare in making its decision.[14] Under the present statute the Commission must consider the risk of recidivism and whether "release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law," standards that give the Commission ample if not unlimited discretion. Courts have recognized that the Commission's discretion, even under the new statute, is all but absolute. See, *e.g.*, *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Best* v. *Ciccone*, 371 F.2d 981 (8th Cir. 1967).

Until 1970 the Commission exercised its discretion case by case, using few published criteria. In response to widespread criticism that this led to arbitrary and erratic decisions,[15] the Commission, in co-

[14] 18 U.S.C. (1970 ed.) 4203 provided:

> If it appears to the Board of Parole * * * that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

[15] Both the federal and state parole boards had been criticized severely for the failure to adopt formal standards for parole decision making. A report of the National Advisory Commission on Criminal Justice Standards and Goals summarized this shortcoming as follows:

> The absence of written criteria by which decisions are made constitutes a major failing in virtually every parole jurisdiction. Some agencies issue statements purporting to be criteria, but they usually are so general as to be meaningless. The sound use of discretion and ultimate

operation with the Research Centers of the National Council on Crime and Delinquency, undertook an analysis of its previous decisions in order to identify the policies and release criteria implicit in those decisions. These studies showed that in making parole decisions the primary concerns were severity of offense, parole prognosis, and institutional behavior, and that a fairly accurate prediction of the Commission's

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accountability rest largely in making visible the criteria used in forming judgments. Parole Boards must free themselves from total concern with case-by-case decision making and attend to articulation of the actual policies that govern the decision making process.

National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973). See also N. Morris, *The Future of Imprisonment* 24-43 (1974); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); A. von Hirsch & K. Hanrahan, *Abolish Parole?* 7-14 (1978).

The federal Parole Board in particular was sharply criticized for its failure to articulate an explicit paroling policy:

> An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents * * *.

K. C. Davis, *Discretionary Justice* 126 (1969). A similar suggestion for the adoption of paroling guidelines was made by the Administrative Conference of the United States. See *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole (adopted June 9, 1972)*, 2 *Recommendations and Reports of the Administrative Conference of the United States* 58-62 (1973).



parole release decisions could be made by knowledge of the Commission's evaluations of these three factors.[16]

As a result of these studies, the Commission began to experiment with structured release criteria that took into account the factors that figured most prominently in the Commission's past decisions—the nature of the offense and the offender's personal characteristics. It ranked offenses by severity and assigned weights to offender characteristics according to their statistical value as predictors of recidivism. For each combination of offense severity and risk of recidivism, the prisoner and the Parole Commission could find in a table a range (*e.g.*, 36 to 45 months) within which approximately 80 to 85% of the persons with similar characteristics could expect to serve, with good institutional behavior, before release.[17] The research was commenced in 1970, before the defendants[18] here were sentenced. The use of guidelines

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[16] See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime and Delinquency 34, 37 (1975). See also the data discussed in Morris, *supra*, and Stanley, *supra*.

[17] For a history of this development and a more detailed description of the system, see Stanley, *supra*; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Federal Probation 7-15 (December 1975).

[18] For purposes of convenience, we will refer to Addonizio, Bonanno, Whelan and Flaherty as "defendants" or "prisoners."

was initiated on a trial basis in one region in 1972 and was significantly revised and extended throughout the nation in November 1973 (38 Fed. Reg. 31942).[19] The present guidelines are codified at 28 C.F.R. 2.20. The Commission now is required by statute to maintain a guideline system. 18 U.S.C. 4203(a)(1) and 4206(a).[20]

The guidelines thus are "the result of an effort to introduce more consistency in parole decision-making" (*United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976)), and they serve this function principally by enabling the Commisioners to announce—to the Commission's hearing examiners especially—how the Commission exercises the discretion given it by statute. As the Conference Committee stated in recommending enactment of the current statute, "the parole authority must have in mind some notion of the appropriate range of time for an offense," and the "use of guidelines * * * will sharpen this process and improve the likelihood of good decisions." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976). The guidelines are not inflexible. They establish broad ranges of confinement for persons with good institutional behavior. Institutional offenses or

[19] The 1972 experiment in the Commission's northeast region (which includes New Jersey) involved a table of factors and the computation of guideline release ranges similar to those in use today.

[20] The guidelines are subject to periodic study and revision. See 42 Fed. Reg. 39808 (1977). See also S. Conf. Rep. No. 94-648, *supra*, at 27.



extraordinarily good behavior will justify a decision outside the ranges. Unusual circumstances related to the severity of the offense also will cause a departure from the guidelines.[21] And the Commission has generally reserved the privilege to depart from the guidelines whenever it concludes that circumstances warrant. 28 C.F.R. 2.18, 2.20(c).

### B. The Statutes Give To The Commission Full Authority To Determine The Actual Length Of Imprisonment

The system of sentencing and parole release we have described allocates to judges the authority to select a maximum sentence from among those authorized by Congress and, within limits, to set the date on which the prisoner will become eligible for parole. But Congress has established important restrictions on the power of courts to prescribe the actual amount of time that any prisoner serves. A court cannot set a parole eligibility date that is more than one-third of the maximum term it imposes. When it imposes a "split" sentence (both imprisonment and probation), the length of imprisonment

[21] 18 U.S.C. 4206(c) allows the Commission to grant or deny release on parole notwithstanding the guidelines if it determines there are good reasons for so doing, provided the Commission gives the prisoner written notification stating the reasons and information relied on. Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

cannot exceed six months. A court has authority to modify its sentence during the first 120 days after it becomes final, but that time cannot be extended. Fed. R. Crim. P. 35, 45(b). This system of powers and restrictions gives to the Parole Commission the authority to set a release date somewhere between the earliest eligibility for release and the date of mandatory release established by the maximum term less good time credits. See generally *United States* v. *Grayson*, No. 76-1572 (June 26, 1978), slip op. 6.

There are good reasons for this allocation of authority. After fixing a sentence "the judge becomes progressively less familiar with the considerations material to the adjustment of the punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments." *Affronti* v. *United States*, 350 U.S. 79, 84 n.13 (1955).[22] See also *Moody* v. *Daggett*, 429 U.S. 78, 89 (1976).

The Commission employs penological experts and hearing examiners trained in the field of penology. These personnel can assess the prisoner's character and prospects, make a studied determination based on their experience with thousands of other cases about the appropriate time for release, and conduct periodic review hearings. An independent body of Commissioners can study the parole procedures in

[22] See also *Hearings on H.R. 1598 and identical bills Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 180 (1973) (testimony of Assistant Attorney General Antonin Scalia).



use and change them when appropriate.[23] The Commission acts collectively, so that individualistic reactions to particular facts will not necessarily control the outcome of the cases.

More than that, the establishment of an independent body with the ultimate say on release decisions can reduce the disparity that is associated with sentencing by individual judges, who may give dramatically different sentences to similarly-situated offenders.[24] Individual judges can do little about this problem,[25] and Congress therefore intended that the Commission "balanc[e] differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system." S. Conf. Rep. No. 94-648, *supra*, at 19; H.R. Conf. Rep. No. 94-838, *supra*, at 19. See

[23] See 18 U.S.C. 4203(a)(1). The Commission has recognized that the use of guidelines might create an unnecessarily rigid system to replace the unnecessarily chaotic one that preceded it. The Commission therefore has reserved the right to depart from its guidelines in particular cases and to reexamine the guidelines periodically. See 28 C.F.R. 2.20(g). See also Gottfredson, Hoffman, Sigler & Wilkins, *supra*, at 41; S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

[24] This disparity has been strongly criticized. See, *e.g.*, M. Frankel, *Criminal Sentences: Law Without Order* (1973).

[25] Attempts by district courts to reduce sentencing disparity through consultation, sentencing councils and other devices have not been notably successful. See, *e.g.*, Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975). Cf. Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. Research J. 881.

also S. Rep. No. 94-369, 94th Cong., 1st Sess. 16 (1975).

Given the legislative judgment that an independent administrative agency should make the decision about the length of time any particular prisoner serves, within the outer limits selected by the court, the question presented here becomes "whether, when shaping its sentence, the sentencing court's failure to predict what the parole authorities would do provides any ground" for modifying the sentence. *United States* v. *McBride*, 560 F.2d 7, 11 (1st Cir. 1977). The Third Circuit has given two general reasons for asserting such a power to revise sentences.[26] We discuss them in order.

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[26] The Eighth Circuit also has concluded that courts may revise sentences in response to parole decisions, when the parole decision demonstrates that a prisoner sentenced before November 1973 was denied "meaningful consideration" for release from a sentence imposed under 18 U.S.C. 4205 (b) (2). See *United States* v. *Lacy*, 586 F.ad 1258 (8th Cir. 1978) (en banc). Under the standards of *Lacy* judges in the Eighth Circuit should rarely, if ever, revise a sentence that was lawful when imposed.

The First, Second, Fourth, Sixth, Seventh, and Ninth Circuits have held that courts lack authority to revise sentences in response to parole decisions or changes in parole policies. See *United States* v. *McBride*, *supra*; *United States* v. *DiRusso*, 548 F.2d 372 (1st Cir. 1976); *Thompson* v. *United States*, 536 F.2d 459 (1st Cir. 1976); *United States* v. *DiRusso*, 535 F.2d 673 (1st Cir. 1976); *Dioguardi* v. *United States*, No. 78-2058 (2d Cir. Nov. 15, 1978); *Farmer* v. *United States Parole Commission*, No. 77-2017 (4th Cir. Nov. 29, 1978); *Wright* v. *United States Board of Parole*, 557 F.2d 74 (6th Cir. 1977); *Coil* v. *United States*, Misc. No. 76-8086 (7th Cir. Sept. 17, 1976), cert. denied, 429 U.S. 1050 (1977); *Elliott* v. *United States*, 572 F.2d 238 (9th Cir. 1978); *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1976); *Tedder* v. *United States Board of Parole*, 527 F.2d 593, 594 n.1 (9th Cir. 1975). The Fifth Circuit has indicated that it is inclined to follow these six courts if it should be squarely presented with the problem. *United States* v. *Kent*, 563 F.2d 239 (5th Cir. 1977) (sentence imposed after November 1973 may not be reduced despite any frustration of the judge's subjective expectations). A panel of the Fifth Circuit stated in dicta that sentences imposed before that date could be revised (*United States* v. *McIntosh*, 566 F.2d 949 (5th Cir. 1978)), but it later withdrew that opinion (*id.* at 952).



1. The foundation for the Third Circuit's holding is its conclusion that "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible" (78-156 Pet. App. 8a). The court derived this principle from the fact that district judges have almost complete power over the maximum sentence to be served; "it would necessarily follow," the court said, "that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the greatest extent possible" (*id.* at 9a). The court also thought that it would violate "the integrity of the sentencing court" and offend "concepts of decency and fair play" if the Commission were allowed to require a prisoner to stay in jail for longer than the sentencing judge intended (*ibid.*).

But the conclusions of the Third Circuit do not "necessarily follow" from the premise that judges have substantial control over the maximum sentence to be served. The conclusion that judges must control

the actual amount of time served because they control the maximum is a simple non sequitur. It amounts to nothing other than disagreement with the statutes that commit the release decision to an independent body. Our discussion of the pertinent statutes (see pages 24-31, *supra*) demonstrates that Congress has divided between the courts and the Executive Branch the power to determine how long a prisoner must serve. Courts cannot properly reason that, because they set one of the important dates (the maximum sentence), they must be allowed to set every important date.

It does not help the argument to cast it in terms of an objection to the "frustration" of the court's "intent." That begs the question whether a court properly may have (or do anything about) an "intent" that the prisoner be released by parole officials at any particular time. It is inevitable, moreover, that judges will be "frustrated" from time to time by the Commission's decisions. Unless those decisions sometimes differ from the decisions that the judges would have made (or think should be made) there would be little point in having a Commission. And unless the Commission can disappoint the desires of judges, it cannot fulfill its salutory task of smoothing out the disparities in the sentencing practices of individual judges.

The nature of the legislative plan is most plain in two statutes: the first (18 U.S.C. 4205(b)(1)) explicitly withholding from courts the power to fix a parole eligibility date at more than one-third of the



maximum sentence, and the second (18 U.S.C. 3651) explicitly withholding from courts the power to combine probation with imprisonment exceeding six months. The inference is unescapable that Congress intended to forbid courts to select precise release dates, and in particular to forbid the combination of a judicially-selected release date with a term of post-release supervision (whether on probation or parole). The Third Circuit's decision allows district courts to produce the very combination of precise release date and post-release supervision that the statutes forbid.

Congress' desire to preserve to the Commission alone the authority to set release dates also is demonstrated by the provision of the Parole Commission and Reorganization Act that release decisions shall be deemed "committed to agency discretion," thus precluding review under the Administrative Procedure Act. Compare 18 U.S.C. 4218(d) with 5 U.S.C. 701(a)(2). See also 18 U.S.C. 4207(4), which authorizes sentencing judges to submit to the Commission recommendations concerning parole release; the Commission must "consider," but not necessarily follow, these recommendations.

So long as Congress adheres to its judgment that release decisions should be made by an administrative panel, courts cannot insist that the administrative body exercise its discretion in any particular way. Any attempt by a judge to "vindicate" his personal expectations about the actual amount of time to be served would nullify the legislative plan. As the First Circuit explained in *United States* v. *DiRusso*,

548 F.2d 372, 374-375 (1976): "[T]he division of responsibility between the sentencing court and the Parole Commission would be skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer time than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's decision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body." [27]

2. The Third Circuit's second principal reason for concluding that courts may revise their sentences stemmed from its belief that the Commission only recently has begun to give substantial importance to the seriousness of the offense, and that it had not previously done so. (We show at pages 50-55, *infra*, that the court's belief about the Commission's prac-

[27] For similar reasons, a court could not resentence a defendant simply because federal prison officials placed him in confinement more onerous than the judge intended or did not provide the prisoner with rehabilitative programs that the judge would have desired. 18 U.S.C. 4081 gives federal prison officials "full discretion to control * * * conditions of confinement" (*Moody* v. *Daggett*, *supra*, 429 U.S. at 88 n.9). A court's belief that a 10-year sentence would be appropriate only if served in a minimum-security prison, and that some other sentence would be appropriate if it were to be served in a maximum-security prison, thus would not authorize a court to alter its sentence if the prisoner should be moved from one prison to another. Cf. *Meachum* v. *Fano*, 427 U.S. 215 (1976).



tices before November 1973 is incorrect.) That meant, the court thought, that the Commission might deny release for the same reasons that the sentencing judge had used to give a "stiff" sentence. In Addonizio's case in particular, the court concluded, the nature of the offense led to an enhanced sentence and to the denial of parole as well.[28] It went on: "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." 78-156 Pet. App. 16a.

But there is no "double punishment" in any of these cases. There is only one punishment—the sentence imposed by the district court. The court's original sentence establishes the maximum period that the Commission can require any offender to serve, no matter how serious the Commission may believe the crimes to be and no matter how long the Commission believes the offender should serve. The court's concern thus reduces to the "frustration" analysis that we have discussed above—that the Commission's evaluation of factors may cause a defendant to serve

[28] The court of appeals also apparently agreed with Judge Barlow's assessment that "the Parole Commission did not take into consideration [Addonizio's] 'excellent institutional record and a very low likelihood of recidivism' " (78-156 Pet. App. 16a, 29a). There is absolutely no support in the record for a conclusion that the Commission did not consider these factors. Its decision is quite consistent with consideration of them (they are, after all, built into the guidelines) and with a conclusion that another factor, the seriousness and nature of the offenses, outweighed them. See A. 11-14. Cf. *United States* v. *Galoob*, 573 F.2d 1167, 1170 (10th Cir. 1978).

more (or less) time than the judge wanted. If a judge does not accurately predict how much weight the Commission may give to a particular factor (such as the seriousness of the offense), he may not be able to impose a sentence that will result in release at a time certain. Here, for example, Judge Barlow apparently imposed his sentence on the assumption that the Commission would release Addonizio automatically at the end of one-third of the sentence (see 78-156 Pet. App. 28a). Judge Barlow said that he imposed a 10-year sentence because he thought that Addonizio should serve three to four years. Judge Barlow was mistaken about the Commission's practices (see pages 50-55, *infra*). This sort of error is just like any other judicial misapprehension (or change in the Commission's practices) that leads to the "frustration" of the judge's desires, and, for the reasons discussed above, does not authorize the revision of a sentence.

The court of appeals may have meant, however,



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oceedings of their "meaning;" the meaning lies in
e ascertainment of the facts and the application of
e rules.[33] The meaning also lies in the content of
e rules themselves. In these cases the Commission
certained the facts and applied its reasoned cri-
ria. The defendants were evaluated by Commis-
ners with open minds; they were not entitled to
aluation by Commissioners with empty minds.[34]

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[33] See *United States* v. *Galoob, supra,* in which a prisoner
ntenced under 18 U.S.C. 4205(b)(2) claimed that he was
nied release without a "meaningful" hearing because the
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**Authorize Sentencing Judges Expectations About The Time s Would Release A Particular**

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served. The Court reasoned that "it is unlikely that Congress would have found it wise to make [judicial control of the sentence] apply in such a way as to unnecessarily overlap the parole and executive-clemency provisions of the law." 350 U.S. at 83.

After *Murray* and *Affronti* judges were effectively forbidden to modify sentences they had imposed. That rule has been modified by Fed. R. Crim. P. 35, which allows a court to correct an illegal sentence at any time and to reduce a sentence, for any reason, within 120 days after its imposition. This 120-day period, which cannot be extended (see Fed. R. Crim. P. 45 (b)),[35] establishes a line of demarcation between the authority of judges over the length of the sentence and the authority of the Parole Commission over how

[35] The 120-day period is jurisdictional. See *United States* v. *Robinson*, 361 U.S. 220 (1960); *In re United States*, No. 78-1409 (4th Cir. Nov. 29, 1978); *United States* v. *Galoob*, *supra*, 573 F.2d at 1171; *United States* v. *Norton*, 539 F.2d 1082, 1083 (5th Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Becker*, 536 F.2d 471, 473 (1st Cir. 1976). It is

much shall be served. The Rule necessarily establishes that only the Executive Branch may reduce a lawful sentence after the expiration of the 120 days.[36] Indeed, "the time limitation [under Rule 35] appears to have as its dual purpose the protection of the district court from continuing and successive importunities and to assure that the district court's power to reduce a sentence will not be misused as a substitute for the consideration of parole * * *." *United States* v. *Stollings*, 516 F.2d 1287, 1289 (4th Cir. 1975).

Given the principles of *Affronti* and *Murray*, and the limits on the sentence revision power granted by Rule 35, the Third Circuit was wrong in concluding that 28 U.S.C. 2255 supplies a residual source of judicial authority to resentence a defendant in response to parole decisions. Although Section 2255 allows courts to vacate sentences that are "subject to collateral attack," this provision is not a catch-all that authorizes courts to do whatever they believe is in the interests of justice. "[T]he appropriate inquiry [is] whether the claimed error of law [is] 'a funda-

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605, 611 n.6 (1973); and *Morrissey* v. *Brewer*,
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believe that the approach taken in the text is pre-
The Second Circuit's analysis does ch

incompatible with the welfare of society * * *." [45] Parole was never mandatory, and no one should have thought that the two statutory criteria both dealt solely with rehabilitation and not at all with principles of deterrence and desert. As one district judge explained: "When Congress permitted the [Commission] to consider the welfare of society after determining whether the prisoner was likely to be law-abiding upon release, it did not preclude the [Commission's] consideration of general deterrence, the concern that an early release of one charged with a serious offense might lessen the deterrent effect upon others contemplating the same offense." *Battle* v. *Norton*, 365 F. Supp. 925, 931 (D. Conn. 1973).

The study we have discussed at pages 27-29 & n.16, *supra*, showed that before 1972 the nature of the offense was one of the three factors that best explained release decisions.[46] Moreover, a sample of the parole

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[45] The language of 18 U.S.C. (1970 ed.) 4203(a) was almost identical to that of the 1910 statute (Act of June 25, 1910, 36

2. The Third Circuit did not
4205(a) requires the Commissio
ticular action after one-third of t
served. Judge Peckham has rea
sion with respect to 18 U.S.C.
ently contending that the Comm
a prisoner sentenced unde. that
third point unless his institutiona
substandard (77-1665 Pet. App.
Circuit has concluded that diffe
tences under Section 4205(a) and
4205(b)(2) authorize judges to
with sentences under the latter
sentences under the former (*Un
supra*). But the data show that
not consistently released at the
soners sentenced under Section 42
47, *supra*).[48] Moreover, the leg

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release. Of those in this group who wer

ection 4205(b)(2) shows that Congress neither in-
nded nor envisioned that the criteria for release
parole of prisoners sentenced under this provision
ould be any different from those used for determin-
g the release of prisoners sentenced under Section
05(a).

Congress' principal purpose in enacting Section
05(b)(2) was to provide a practicable method for
ioothing out the widespread disparities that char-
terized sentences imposed by federal judges. Con-
ess believed that unequal punishment for prisoners
th similar backgrounds who had been convicted of
entical offenses cast doubt on the evenhandedness of
stice and encouraged disrespect for the law. S. Rep.
. 2013, 85th Cong., 2d Ses. 5 (1958); H.R. Rep.
. 1946, 85th Cong., 2d Sess. 6 (1958). The inde-
minate sentencing provision of Section 4205(b)
), Congress felt, would permit the courts to share
th the Executive Branch the responsibility for de-
mining the minimum length of a prisoner's con-

de "the chief means by which
xecutive branch [could] co-
t the public by formulating
t more fully the purposes of
, and reformation." S. Rep.
H.R. Rep. No. 2579, 85th
. Congress emphasized that
tute did not reduce criminal
served under indeterminate
r than did terms under the
. 2013, *supra*, at 5. See also
*ra*, at 3.[49]
lines by the Commission in
criteria to the parole de-
he guidelines instead estab-
s for the consistent evalua-
s and personal backgrounds
y ranges of time that ordin-
y persons with good insti-
rious combinations of those

existing law. S. Rep. No. 94-369, 94th Cong., 1st Sess. 18 (1975). See also *Hearings on S. 1463, S. 119 to Amend Parole Legislation Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st and 2d Sess. (1973-1974), 94th Cong., 1st Sess. (1975) 123 (letter of Sen. McClellan).[50]

As it happens, the guidelines ultimately did not affect the present cases; all four defendants were held longer than the time that the guidelines indicate is customary. All four were denied release because the Commission determined, after thorough attention to their particular crimes, that they were not ordinary criminals (A. 11-14, 60-61, 66-67, 75-79). Even if the

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[50] See also 121 Cong. Rec. 15702 (1975) ("we do not weaken or change or liberalize the standards applied by the Commission whether or not the individual is released") (remarks of Rep. Kastenmeier, Chairman of the responsible subcommittee); 121 Cong. Rec. 15710 (1975) ("[T]he standards which the [Commission] will be applying if this bill is enacted, will be identical to the standards which the [Commission] relies on now. They will look at a prospective parolee's